

A **MAD NAZRI SULAIMAN & ANOR**

v.

PP

B HIGH COURT SABAH & SARAWAK, BINTULU
JOHN KO WAI SENG JC
[CRIMINAL APPEAL NO: 42A-3-2010 (BTU)]
19 MAY 2011

C **CRIMINAL LAW:** *Corruption - Corruptly receiving gratification - Whether presumption under s. 42(1) Anti-Corruption Act 1997 arose once prosecution proved prima facie case - Whether appellants rebutted presumption - Whether case established beyond reasonable doubt*

D **CRIMINAL PROCEDURE:** *Sentence - Appeal against sentence - Corruptly receiving gratification - Whether trial judge considered irrelevant matters and omitted relevant mitigating factors - Whether trial judge committed manifest error in sentencing - Whether interference warranted*

E The appellants, who were police officers, were charged with 7 amended charges, two under s. 10(a)(bb) of the Anti-Corruption Act 1997 ('ACA') read together with s. 34 of the Penal Code ('PC') and five under s. 11(a) of the ACA read together with s. 34 of the PC and s. 20(1)(a) of the ACA. The complainant in this case, PW1, was an Indonesian national who had valid
F Indonesian passport but had no work permit. The appellants purportedly had corruptly attempted to obtain gratification from PW1 as an inducement from refraining to take action against PW1 for working without valid work permit. Pursuant to the complaint by PW1, the ACA officers laid a trap and subsequently arrested
G the appellants. Both appellants were discharged without being called to enter their defence at the end of the prosecution's case by the learned Sessions Court Judge ('SCJ') for all the seven amended charges. However, upon appeal to the High Court, the appellants were ordered to enter their defence and the case was
H reverted to the Sessions Court. After hearing the appellants' case, the SCJ acquitted and discharged the appellants from the first to the sixth amended charges and convicted and sentenced the appellants for the seventh amended charge. Dissatisfied, the appellants appealed against the conviction and sentence imposed
I for the seventh amended charge. The grounds of appeal relied on by the appellants were, *inter alia*, (i) the learned SCJ had failed to adequately consider the defence of the first and second appellants;

(ii) the learned SJC were mistaken in law in taking into consideration the prejudicial and irrelevant evidence and the testimony of PW5 and PW6 in coming to his decision; (iii) the learned SCJ made a mistake of fact and law when he decided that the presumption under s. 42(1) of the ACA was rightly invoked; (iv) the learned SCJ had failed to consider the appellants' character, age, health and antecedents; and (v) the sentence was severe and manifestly excessive in the circumstances of the case.

Held (dismissing appeal):

- (1) The prosecution had proven a *prima facie* case against the appellants and thus, pursuant to s. 42(1) of the ACA, the burden shifted to the appellants to rebut the presumption on the balance of probabilities. (paras 11 & 13)
- (2) The appellants only made bare denials that the charges against them were not true and that they could not remember whether the meetings before May 2003 happened with the complainant PW1. They had also denied the meeting that led to the entrapment of the second appellant by the ACA officers. The SCJ, having subjected the evidence adduced by the prosecution and the defence to maximum evaluation, arrived at the conclusion that the appellants had failed to rebut the statutory presumption under s. 42(1) of the ACA in respect of the seventh amended charge. The prosecution had therefore discharged its burden of proving its case against the appellants beyond reasonable doubt. (paras 15 & 23)
- (3) The evidence of PW5 and PW6 was never challenged nor had the appellants challenged it as inadmissible evidence. On the facts, even though the wordings given by PW1, PW5, PW6 and PW7 on what the second appellant said may differ, nevertheless their testimonies carried the same meaning *ie*, that the second appellant told PW1 to keep the money first as there were people watching them. Although the conversation was not recorded, there were three separate witnesses at the scene and it was sufficient for the court to consider the sufficiency of their evidence. (paras 27-30)
- (4) During appeal from the Sessions Court, having sieved through the notes of proceedings and heard the parties, the High Court concluded that the prosecution had successfully proven the seventh amended charge and thus invoked the statutory presumption under s. 42(1) of the Act and ordered both

- A appellants to enter their defence. The Sessions Court was bound by the finding as there was no appeal launched by the appellants on the court's decision to remit the case back to the Sessions Court. (para 44)
- B (5) The learned SCJ did not take into consideration irrelevant matters or the relevant mitigating factors which appeared to have been correctly overridden by the permanent consideration for public policy. There was no manifest error in law in the sentence imposed by the learned SCJ that warranted interference. (para 44)
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Case(s) referred to:

Hamidon Mat Yatim v. PP [1995] 3 CLJ 724 HC (*refd*)

PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC (*refd*)

PP v. Francis Philip Nunis [1982] CLJ 254; [1982] CLJ (Rep) 648 HC (*refd*)

- D *PP v. Ismail Mohd Azmi & Anor* [2009] 1 LNS 918 HC (*refd*)
PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC (*refd*)
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC (*refd*)
PP v. Mohamed Ali [1962] 1 LNS 129 HC (*refd*)

- E *Rex v. Teo Cheng Lian And Rex v. Leck Kwee Ser* [1949] 1 LNS 81 HC (*refd*)

Legislation referred to:

Anti-Corruption Act 1997, ss. 10(a)(bb), 11(a), 20(1)(a), 42(1)
Penal Code, s. 34

- F *For the 1st & 2nd appellants - Louis Farau; M/s Gapor & Co*
For the prosecution - Mohd Sazilee; DPP

[Editor's note: The Anti-Corruption Act 1997 has since been repealed by the Malaysian Anti-Corruption Commission Act 2009.]

- G *Reported by S Barathi*

JUDGMENT

- H **John Ko Wai Seng JC:**

The Case Background

- I [1] The appellants, Mad Nazri bin Sulaiman (1st appellant) and Maulana bin Rosli (2nd appellant) were charged with 7 amended charges before the Sessions Court at Bintulu. There were two amended charges under s. 10(a)(bb) of the Anti-Corruption Act 1997 (Act 575) (the AC Act) read together with

s. 34 of the Penal Code and 5 amended charges under s. 11(a) of the AC Act read together with s. 34 of the Penal Code and also read together with s. 20(1)(a) of the AC Act ('7 amended charges').

[2] The amended charge (Criminal Case No: 61-07-2005(BTU)) of the 7 amended charges against both appellants (exh. P43g p. 433 Record of Appeal ('ROA')) reads as follows:

That you with common intention on 8th August 2003 between 3.00pm and 3.15 pm at Sri Sarawak Restaurant, Medan Jaya Bintulu, in the District of Bintulu, in the State of Sarawak, being agents of the Government of Malaysia, to wit, Lance Corporal RF 124202 and Lance Corporal RF 135077 of the Royal Malaysian Police Force attached to the Tanjung Kidurong Police Station, did corruptly attempt to obtain for yourselves a gratification, to wit, a sum of RM800.00 from one Cahyo Muniran as an inducement for forbearing to an act in relations to your principal's affairs, to wit, to refrain from taking action against the said Cahyo Muniran for allegedly working in Sarawak without a valid work permit, and that you have thereby committed an offence under Section 11(a) of the Anti-Corruption Act 1997 punishable under Section 16 of the said Act, read with Section 20(1)(a) of the said Act and Section 34 of the Penal Code.

[3] On 18 May 2009, the learned Sessions Court Judge had acquitted and discharged both appellants of all the 7 amended charges at the end of the prosecution's case without calling the appellants to enter their defence.

[4] The respondent was not satisfied with the decision of the learned Sessions Court judge for the acquittal and the discharge of both appellants on all the 7 amended charges, had filed an appeal in the High Court.

[5] After hearing the appeal, the High Court had allowed the appeal and ordered the appellants to enter their defence for all 7 amended charges. The case was then reverted back to the Sessions Court for continuation of the hearing of the appellants' defence against the 7 amended charges.

[6] The learned Sessions Court judge after hearing the appellants' case had on 6 May 2010, ordered the appellants to be acquitted and discharged from the 1st to the 6th amended charges ('the 6 amended charges') and convicted and sentenced appellants for the seventh amended charge.

- A [7] For the conviction under the seventh amended charge, both appellants were each sentenced to a fine of RM10,000 in default three months imprisonment and to five months imprisonment with effect from the date of the sentencing.
- B [8] The appellants being dissatisfied with the decision of the Sessions Court now appeal against the conviction and sentence under the seventh amended charge.

Issues On Appeal

- C *Against Conviction*

[9] Grounds 1 (i) and (v) of the Petition of Appeal:

- D Learned Counsel for the Appellants submitted that the learned Sessions Court Judge had failed to adequately consider the defence of the 1st and 2nd Appellants. The element of the charge was not completely proven by the prosecution.

- E Learned DPP had submitted that the defence story is a mere bare denial and nothing more for all the 7 amended charges preferred against the Appellants. Further the Appellants did not deny the 7th amended charge of attempting to obtain gratification as charged.

- F [10] The evidence adduced by the prosecution at the Sessions Court is as follows:

- G (1) The complainant, PW1 in this case is an Indonesian national. He had a valid Indonesian passport but did not have work permit to work in Sarawak. He had been working illegally in Bintulu without work permit for about 8 years. In April 2003 he was working as a construction labourer at the MLNG Housing Estate in Tanjung Kidurong. (PW1: pg. 24 lines 7-10 & PW8: pg. 138 lines 25-31 of ROA.)
- H (2) Both the Appellants were police personnel with the rank of Lance Corporal attached to the Tanjung Kidurong Police Station. Their duties, among others, were to receive reports and phone calls from the public, beat and patrol duties and arrest any foreigners working without work permit and to lodge police reports for further investigation. PW8: pg. 139 lines 26-34 ROA.)
- I (3) On 6.8.2003 while PW1 was at Medan Jaya with his friend PW2, they encountered the 1st Appellant. After a lapse of 2 months, the 1st Appellant, was apparently not happy for not receiving, any money from PW1, had raised his voice at

PW1 and made an appointment to meet him at a certain Burger Stall on the following day ie, 7.8.2003 at 8.00pm. The 1st Appellant then left the place while PW1 and PW2 left for the Burger Stall. On the way to Burger Stall, PW1 told everything about the 1st and 2nd Appellants to PW2. On reaching the Burger Stall, PW2 informed the owner, PW3 the problems faced by PW1 with regards to the 1st and 2nd Appellants. PW1 then narrated the events that happened during the period from 6.4.2003 to 31.5.2003 which are the facts for the 6 amended charges between him and both the Appellants to PW3. On the request of PW3, PW1 handed over Exhibits P2 (1-6) (1-6 photostat pages of notes totalling RM550.00), P4 (PW1's diary) and P5B (PW1's micro-cassette) to him. (PW1: pg. 31 lines 8-33, pg. 33 lines 29-36; PW2 pg. 72 lines 1-23 & PW3: pg. 78 lines 1-10 of ROA.)

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- (4) PW3 played the micro-cassette (Exhibit P5B) and heard the conversation several times on that night and decided to inform the ACA about the predicament faced by PW1. Therefore, on the following morning ie, 7.8.2003 PW3 telephoned ACA office at Miri and passed the information to ACA officer PW6. PW6 asked PW3 to meet him at an Inn at 5.00 pm together with PW1 and PW2. (PW3: pg. 79 lines 1-16 & PW6: pg. 116 line 33 to pg. 117 line 21 of ROA.)

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- (5) On 7.8.2003 at about 5.30 pm a group of ACA officers led by PW5 met PW1 and PW3 at the Inn. ACA Officer PW15 interviewed PW1 who subsequently lodged an official ACA report (Exhibit P6) against both Appellants. PW15 seized Exhibits P2 (photocopy of notes), P3 (match box), P4 (diary) and P5B (micro-cassette) from PW1. (PW1: pg. 37 lines 5 to pg. 38 line 36 & PW15: pg. 177 line 35 to pg. 178 line 21 of ROA.)

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- (6) At about 8.00 pm on 7.8.2003 all the ACA officers together with PW1 and PW3 waited at the Burger Stall for the arrival of the 1st Appellant. Shortly a Proton Saga car bearing Registration No. MG3037Q arrived at the Burger Stall. PW1 went to the car and found that it was driven by the 2nd Appellant while the 1st Appellant was seated in the front passenger seat. The 1st Appellant said he wanted to see PW3. PW1 then called PW3 to come to the car. When PW3 went to the car, the 1st Appellant came out of the car and asked a few questions and then told him to go back. Later the 1st Appellant asked PW1 to get into the car. PW1 took his seat at the back seat of the car while the 1st Appellant returned to his seat at the front passenger seat.

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- A** The 1st Appellant then threatened PW1 with words, among others, “Kamu jangan bohong, jangan tipu. Kamu jangan main api Cahyo, api itu panas. ... Walaupun kamu sepuluh tahun atau dua puluh tahun, kamu tetap warga asing. Saya tidak mahu lebih, saya tidak mahu kurang. ...”. PW1
- B** replied that he would look for the money on the following day and if found the money he would telephone the 1st Appellant. The 1st Appellant then asked whether PW1 could still remember his phone number. When PW1 replied that he had forgotten it, the 1st Appellant said the number and PW1 wrote it on his departure card (Exhibit P8 at pg. 350 of ROA) ie, 013-8396476. Both the Appellants then left the
- C** place leaving PW1 there. (PW1: pg. 41 lines 23 to pg. 43 lines 20; PW3: pg. 79 lines 20-40; PW15: pg. 179 lines 1-7 of ROA & Exhibit P8.)
- D** (7) On 8.8.2003 at about 1.55 pm at another Inn, ACA officer PW10 recorded a telephone conversation between PW1 and the 1st Appellant using PW15’s hand phone No. 013-8360928. In the recorded conversation (through micro-cassette - Exhibit P25B and its transcript - Exhibit P27 from line 16 at pg. 382 of ROA:) the 1st Appellant, in reply to the amount to be paid is recorded to have said, “... Macam biasa yang abang cakap... tak lebih tak kurang kan ... Lapan kan” PW1 then made an appointment with the 1st Appellant at 3.00pm at SS Restaurant to hand over the money. (PW1: pg. 43 lines 22-37; PW10: pg. 148 lines 6-40 & PW15: pg. 179 lines 36-40 of ROA.)
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- F** (8) The ACA officers laid a trap at SS Restaurant on 8.8.2003 at 3.00pm to arrest the 1st Appellant. PW1 went to the restaurant and found that the 2nd Appellant was already seated at one of the tables. PW1 then took his seat at the same table whereas 3 ACA officers, namely PW5, PW7 and
- G** Officer Ahmad Ariff had already taken their seats at a different table at the same restaurant. (See layout in sketch plan Exhibit P18 at pg. 367 ROA.) The 2nd Appellant told PW1 that the 1st Appellant could not come because he had some other matters and continued, “Sebab itulah saya datang sini.” The 2nd Appellant then asked, “Sudah adakah?” PW1 replied, “Sudah, tapi tunggu pukul 3.00 nanti sebab saya pinjam duit sama kawan.” Shortly, as planned, PW6 came there with the trap money and took his seat at the table where PW1 and the 2nd Appellant were seated. PW6 then handed the trap money of RM800.00 (Exhibits P11a-n) to
- H** PW1. PW1 counted the money and then gave it to the 2nd Appellant. The 2nd Appellant received the trap money, re-arranged the notes and then passed the money back to PW1
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telling him 'keep the money first. Give me later. Many people watching' referring to the table where 3 ACA officers (PW5, PW7 and Ariff) were seated. PW6 then excused himself and left the restaurant. The 2nd Appellant then told PW1, "itu duit simpan bagus sikit sebab ada 3 orang sana perhatikan saya terus" referring to the 3 ACA officers. PW1 then put the trap money into a cigarette box of L. A. menthol brand (Exhibit P12) brought by the 2nd Appellant. He then passed the cigarette box (Exhibit P12) containing the trap money to the 2nd Appellant. However, the 2nd Appellant did not take it saying, "ada 3 orang sana perhatikan saya terus...boleh kamu simpan wang dalam kotak rokok itu bagus sikit." PW1 then took the cigarette box towards the toilet, and in front of the toilet door he rearranged the money properly into the cigarette box and closed it neatly. He then returned to the 2nd Appellant and gave it to him, but he still did not accept it saying, "Ini kotak rokok kamu bawa dulu, kita keluar jumpa Nazri ... sebab saya tidak nyaman kalau wang ini kurang atau lebih, Nazri tidak tahu." The 2nd Appellant then instructed PW1 to bring the cigarette box (Exhibit P12) to his car. As both PW1 and the 2nd Appellant walked towards the car, the 2nd Appellant was arrested by PW7 outside the restaurant. The 2nd Appellant put up a struggle. During the struggle PW1 handed over the cigarette box containing the trap money to PW7. (PW1: pg. 48 line 9 to pg. 51 line 9, PW5: pg. 106 line 13 to pg. 107 line 28; PW6: pg. 121 line 23 to pg. 122 line 34; PW7: pg. 129 line 6 to pg. 133 of ROA.)

(9) PW7 then made a body search on the 2nd Appellant and also the car No. MG3073Q and found, among others, a brand new L.A. Menthol brand cigarette box in the car. (PW15: pg.180 line 29 to pg. 181 line 12 & Exhibit P35 para. 19 - pg. 403 of ROA.) He had said in cross-examination line 20 - pg. 205 of ROA.) : "I just smoked for fun. My brands were Dunhill and Parkway. LA menthol lights not my brand."

(10) PW13 confirmed that the Proton Saga car No. MG3073Q belonged to him and that he had sold it to the 2nd Appellant in 2003 and asked the 2nd Appellant to continue to pay the instalments due to the bank, without transfer of ownership. (PW13: pg. 163 line 40 to pg. 164 line 5 of ROA.)

(11) PW14 the Customer Service Personnel of Celcom Malaysia, who is accessible to the particulars of customers and calls made, confirmed that 013-8396476 belonged to the 2nd Appellant and that 013-8360928 belonged to PW15. She also

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A confirmed that there was a call made on 8.8.2003 at 1.57 pm from 013-8360928 to 013-8396476. (PW14: pg. 170 line 1 to pg. 171 line 12, Exhibits P33A-B (pg. 400) & P34A-B (pg. 402) at pgs. 395-396 of ROA.)

B [11] We have to remember here that the appellants were originally acquitted and on appeal the learned High Court Judge had called the defence based on the above evidence adduced by the prosecution sufficient to invoke the statutory presumption under s. 42(1) of the AC Act, that means that the prosecution had proven a *prima facie* case against the appellants sufficient to
C convict if no evidence is called by the appellants to rebut the presumption and the prosecution's evidence adduced.

[12] The presumption under s. 42(1) of the AC Act reads as follows:

D Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that **any gratification has been accepted** or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to **the accused, the gratification shall be presumed to have been corruptly accepted** or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, **unless the contrary is proved.** (emphasis added)
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[13] By virtue of the provision of s. 42(1) of the AC Act the burden is now shifted to the appellants during the defence stage to rebut the presumption on the balance of probabilities that they had not attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to them, the gratification. This
G burden on the appellants is a heavier burden than the normal burden of casting a reasonable doubt in the prosecution's case.

[14] In *PP v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162
H PS Gill J has clearly explained the law on presumption as follows:

I When the prosecution is minded in invoking the presumption, then the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumption on a balance of probabilities. **This from the defence point of view is heavier than the burden of casting a reasonable doubt** but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. (emphasis added)

[15] The evidence adduced by the appellants in their defence before the Sessions Court Judge is as summarised in the judgment of the learned Sessions Court Judge at paras. 12 to 14 (at p. 322 of ROA) that there was never any denial of their contact with PW1. The appellants only made bare denials that the 6 amended charges and the seventh amended charge brought against them were not true and they could not remember whether the meetings before May 2003 happened with the complainant PW1. The appellants also denied the meeting on 7 August 2003 at the Burger Stall leading to the entrapment of the 2nd appellant on 8 August 2003 by the ACA officers at the SS Restaurant.

[16] The 1st appellant's evidence was:

1. "Under no circumstances I have received corrupt money from Cahyo" (DW1: pg. 197 lines 31-32 of ROA);
2. "Regarding these corruption charges, I had never demanded or I received any corrupt money from Cahyo" (DW1: pg. 198 lines 22-23); and;
3. "I feel that I never committed these offences, and I hope that I get justice. All the charges brought against me were not true." (DW1: pg. 198 lines 31-33).

[17] The 2nd appellant's evidence was:

1. "I never solicit, demand or receive any corrupt money from Cahyo. At the restaurant when I met him, I did not demand, solicit and receive corrupt money from Cahyo" (DW2: pg. 230 lines 1-3); and;
2. "These charges against me are false and malicious." (DW2: pg. 230 line 9).
3. "I have been arrested since 2003, and I was wrongly accused for corruption which I did not commit." (DW2: pg. 230 lines 11-12)

[18] A review of the learned Sessions Court Judge's judgment (from pp. 320-323 ROA) shows that he had given a thorough evaluation of the evidence of both sides and accepted that the appellants' bare denials were not sufficient on a balance of probabilities to create a reasonable doubt on the seventh amended charge raised by the presumption and the prosecution's evidence.

[19] The court will also observe in addition to what the learned Sessions Court Judge had found that when we consider the other evidence and the exchange before the fateful meeting between the

- A 1st appellant when matched with that of the 2nd appellant, on the identity of the person to meet and purpose of the visit shows up the material self contradiction of their evidence which were never explained:
- B 1. (i) The 1st Appellant, Nazri says that he got information from PW1 and he had given his phone number to him (from lines 10 to 25 pg. 207 ROA). Next he denies the 2nd Respondent, Maulana gave their phone numbers to PW1. This contradicts with Exhibit P3 where Maulana had written it on the matchbox (Exhibit P3) and given it to PW1 (PW1: pg. 30 at lines 6 – 24, pg. 56 to lines 29 – 40 to pg. 57 lines 1-9; DW1: pg. 212 lines 20 – 35 ROA.)
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- D (ii) In respect of the fateful meeting at 3pm at SS Restaurant, Medan Jaya, 1st Appellant has this to say (from lines 35 pg. 197 ROA):
- E On 8/8/03, the day I was arrested, C (PW1) did tell me, I could not remember the conversation. He did say, he wanted to see me, but I did not have the time. I am not sure why he wanted to see me. I tried to contact Maulana, and tried to ask him to see C (PW1) to see what the problem was. I managed to contact Maulana ...
- F In cross-examination the 1st Appellant said this (from lines 10 to 25 pg. 207 ROA):
- G I told Maulana through the telephone that C (PW1) wanted help, and what help I did not know. I told him if he was free, he was to go there. I said near SS.
- H 2. (i) The 2nd Appellant, Maulana says that he did not know whether PW1 had his contact number (from line 8 of pg. 229 ROA). This contradicts with Exhibit P3 (matchbox) where he had written it on the matchbox and given it to PW1. (PW1: pg. 59 lines 30-40 to pg. 60 lines 1-14; DW2: pg. 246 lines 11-40 to pg. 247 line 1 ROA.)
- I (ii) In respect of the fateful meeting at 3pm at SS Restaurant, Medan Jaya, 2nd Appellant has this to say in his examination in chief (from lines 10 – 20 pg. 229 ROA):
- On the day of arrest on 8/8/03, I had a drink in one of the restaurants. Then C (PW1) came to see me when I was there. Before that C (PW1) turned up. **Earlier Nazri called me to say C (PW1) wanted to see him**, but he could not make it, and he asked me to meet C (PW1) instead. I did ask Nazri why he

- (PW1) wanted to see him, but Nazri said, he did not know why. So, I went to see C (PW1) instead of Nazri. It was at the restaurant at Medan Jaya. I could not remember the name of the restaurant. **When C (PW1) came, he asked me where was Nazri. I told him Nazri could not meet him. And I asked him why he wanted to see Nazri. Then, he told me that he wanted to give certain information to Nazri.** After that he took a packet of cigarette, and put it on top of the table. I pushed the packet of cigarette to C (PW1) because I was not sure what was inside the cigarette packet ... (emphasis added) A
- In his cross-examination the 2nd Appellant said (from lines 20 to 34 pg. 248 ROA) he said this is what Nazri told him: B
- A : He asked me to meet a person because he got some problem, and to meet the person at Medan Jaya.” C
- A : That was to meet one Indonesian who was having problem. D
- Q : **Did he say the said person was C (PW1)?**
- A : **No”**
- (emphasis added) E
- Later on the 2nd Appellant said at line 34 at pg. 250 ROA:
- Q : **Any conversation between C (PW1) and you at the restaurant?**
- A : **No.** F
- Q : **Not even a word?**
- A : **Yes.**
- Q : You did not ask him he was the one having problem and the one who called Nazri? G
- A : I have no time to ask.
- Q : And you did not ask what was his problem?
- A : Yes. H
- (emphasis added)
- (iii) In respect of the origins of the empty LA Menthol packet (Exhibit P12) into which the trap money was placed: I

- A** PW1 said it came from 2nd Respondent (lines 37 - 39 pg. 48 ROA):
- ... Then, I put the money in a cigarette box which was brought by Maulana. The cigarette box was that of LA menthol.
- B** PW5 in respect of this says (lines 1- 16 pg. 107 ROA):
- ... After Nizam left the restaurant, I saw 2nd (Respondent) passed a white cigarette packet to C (PW1). Then, the 2nd accused whispered something which I could not hear.
- C** P.O : If a white cigarette packet is shown to you would you be able to identify?
- PW5 : Yes.
- P.O : Show ID-12 to witness. Is this the one?
- D** PW5 : Something like that. ...
- DW2 denies that it is his (lines 5 - 22 pg. 250 ROA):
- A : I pushed the cigarette packet back to him.
- E** Q : At that time, the cigarette was still closed?
- A : Yes.
- Q : And you did not see what was inside?
- F** A : Yes.
- Q : And you agree with me that you take this brand of cigarette?
- A : Disagree.
- G** Q : What type of cigarette did you take?
- A : I just smoked for fun. My brands were Dunhill and Parkway. LA Menthol Lights not my brand.
- H** On the 2nd Appellant's denial about LA Menthol not being his brand, PW7 had testified which was not challenged by the defence that he had made a body search on the 2nd Appellant and also the car No. MG3073Q and found, among others, a brand new L.A. Menthol brand cigarette box in the car. (PW15: pgs. 180 line 29 to pg. 181 line 12 & Exhibit P35 para. 19 - pg. 403 of ROA.) Exhibit P35 the search list is acknowledged by the
- I** signature of the 2nd Appellant.

[20] From the prosecution's evidence it is evident that the ACA wanted to ensure that the handing over of the entrapment money to the 2nd appellant could be openly done by PW1 to be witnessed for the record. (PW5: p. 102 line 34 to p. 103 line 5; PW1: p. 65 lines 4-10.) Similarly, there would be no reason for PW1 to be furtive about the matter as to hide the RM800 in the LA Menthol cigarette packet (exh. P12) for handing over to the 2nd respondent (PW1: p. 48 lines 25-40; p. 66 lines 6-19). On the other hand it is the 2nd respondent who would not want the RM800 flouted openly for him to be seen receiving it from PW1 and hence he had every reason to introduce the LA Menthol cigarette packet (exh. P12) for PW1 to put it in because he was rightly wary of the three persons seated at the next table (the ACA officers). (PW1: p. 50 lines 31- 41; p. 66 lines 21-24; PW5: p. 114 lines 10-13; PW6: p. 122 lines 17- 20.) The above evidence makes the 2nd appellant's denial of his producing the empty LA Menthol cigarette packet (exh. P12) untenable.

[21] The above discrepancies highlighted in the extracts of the 1st appellant and 2nd appellant's evidence will happen because the appellants are making up a story as to the whole episode on the incident which constituted the seventh amended charge thus adding up to make their defence of denial as even less credible as a sham and insufficient to rebut the prosecution's case.

[22] Next learned DPP had further correctly submitted that mere denial without other proof cannot be said to have raised a reasonable doubt in the prosecution's case where the burden of the accused is only to cast a reasonable doubt, which is a lighter burden citing the following authorities:

PP v. Ling Tee Huah [1982] 2 MLJ 324 at pg. 326:

A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.

DA Duncan v. PP [1980] 2 MLJ 195 (Supreme Court):

The defence was, in effect a simple denial of the evidence connecting the appellant with the four boxes. We cannot see any plausible ground for saying that the four boxes were not his. In the circumstances of the prosecution's evidence, the High Court came in our view, to the correct conclusion that **this denial did not cast a reasonable doubt** on the prosecution case against the appellant. (emphasis added)

- A *PP v. Ku Lip See* [1981] 1 MLJ 258 & [1982] 1 MLJ 194
(Federal Court):

B ... the defence in its endeavour to create a reasonable doubt in the mind of the learned President offered an **outright denial** and nothing more. It was surprising to 1 find the learned President entertained what to him was reasonable doubt based entirely on the demeanour and the **denial of the respondent** ... (emphasis added)

C [23] The court finds that the learned Sessions Court Judge had discharged his duty as required by law with sufficient maximum evaluation of the evidence adduced by the prosecution and the defence to arrive at the conclusion that the appellants had failed to rebut the statutory presumption under s. 42(1) of the AC Act in respect of the seventh amended charge and that the
D prosecution had discharged its burden of proving its case for attempted corruption against the appellants beyond reasonable doubt.

Grounds 1 (i) And (v) Of The Petition Of Appeal Is Not Made Out

E *Grounds 1 (ii) And (iv) Of The Petition Of Appeal*

F [24] Learned counsel for the appellants had submitted that the learned Sessions Court Judge had mistaken in law in taking into consideration the prejudicial and irrelevant evidence and the testimony of PW5 and PW6 as to the incident in SS restaurant in coming to his decision.

G [25] Learned DPP had submitted that the learned Sessions Court Judge had rightly considered all relevant facts and admissible evidence before coming to his decision for the seventh amended charge.

H [26] A reference to the written judgment of the learned Sessions Court Judge (at pp. 319 until 324 of ROA) shows that the learned Sessions Court Judge had considered thoroughly the admissible evidence adduced against both appellants for the seventh amended charge.

I [27] The admission of the evidence of PW5 and PW6 who were BPR officers, was never challenged below nor have the appellants challenged it as inadmissible evidence for any legal reasons here. The appellants' challenge appears more directed towards as to whether it can be believed by the court by virtue of discrepancies

as to the actual wordings used in evidence as opposed to what is the intention or gist of the evidence of PW1, PW5, PW6 and PW7 which is the same.

A

[28] The appellants had questioned their credibility by raising the question as to why PW1, PW5, PW6 and PW7 heard different words being uttered by the 2nd appellant. The court is of the opinion though the wordings given by PW1, PW5, PW6 and PW7 on what the 2nd appellant said may differ in their testimonies in court but it still carries the same meaning: whereby the 2nd appellant told PW1 to keep the money first as there were people watching them.

B

C

[29] The appellants next submitted that the Anti-Corruption Agency did not tape-record the conversation that took place in the SS restaurant. It is the court's opinion that even though the conversation was not recorded, there were three separate witnesses (PW5, PW6 and PW7) at the scene and it is sufficient for the court to consider the sufficiency of their evidences. Recording after all is supporting evidence and no adverse presumption will be drawn on the failure to tape-record the ongoing at the scene.

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[30] Since the learned Sessions Court Judge had the benefit of hearing their evidence, the court sees no reason to interfere with their acceptance of their evidence in total below.

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[31] On this *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] MLJ 257 Thomson CJ had succinctly stated as follows at p. 288:

When a police witness says something that is not inherently improbable **his evidence must in the first instance be accepted**. If he says he saw a cow jumping over the moon his evidence is of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see everyday of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. *In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted* (emphasis added).

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A Grounds 1 (ii) And (iv) Of The Petition Of Appeal Is Not Made Out

Ground 1 (iii) Of The Petition Of Appeal:

B [32] Learned counsel for the appellants submitted that the learned Sessions Court Judge had made a mistake of fact and law when he decided that the presumption under s. 42(1) of the AC Act was rightly invoked.

C [33] The court agrees with the submission of learned DPP that when this court in allowing the prosecution's appeal against the appellants' acquittals at first instance, this court had found that there was a *prima facie* case against the appellants by virtue of the presumption under s. 42(1) of the AC Act and had remitted this case after calling the defence back to the Sessions Court to hear the defence's case, the presumption was already applied to both appellants.

E [34] This comes about because on the appeal, the court had sieved through the notes of proceedings of this case and after having heard the submissions from both parties, this court had come to the conclusion that the prosecution had successfully proven that:

F (i) At all material times both the accused persons (1st Appellant and 2nd Appellant) were agents of the Government of Malaysia, namely, Lance Corporal 124202 and Lance Corporal 135077 respectively of the Royal Malaysian Police Force attached to the Tanjong Kidurong Police Station; and;

G (ii) Both the Appellants did solicit a gratification from C (PW1) as per the amended charges Exhibits P43(a) & P43(c), did accept a gratification from PW1 as per amended charges Exhibits P43(b), P43(d), P43(e) & P43(f) and did attempt to obtain a gratification from PW1 as per the seventh amended charge Exhibit P43(g).

H [35] The High Court then invoked the statutory presumption under s. 42(1) of the AC Act and ordered that both appellants to enter their defence to rebut the presumption.

I [36] The Sessions Court was bound by the finding of this court as there was no appeal launched by the appellants against this court's decision to remit the case back to the Sessions Court to hear the defence's case.

Ground 1 (iii) Of The Petition Of Appeal Also Fails**A***Against Sentence (Ground 2(i) and (ii))*

[37] Learned counsel for the appellants have submitted that the learned Sessions Court Judge had failed to consider the appellants' character, age, health and antecedents as well as the sentence was severe and manifestly excessive in the circumstances of the case.

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[38] Learned DPP had submitted that the sentence imposed upon the appellant is in accordance with the law and also just and fair in the circumstances of the case.

C

[39] In respect of the role of an appeal court on sentencing, this court stands guided by what was stated in the case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 at p. 257:

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... that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

E

[40] It was also stated at p. 258 para. H to the right (*ibid*):

... perhaps the main duty of the court is to lead public opinion

[41] In respect of the considerations and policies for sentencing for corruption cases, reference is made to the case of *Hamidon Mat Yatim v. PP* [1995] 3 CLJ 724 at p. 736 para. e-g, which stated:

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I must stress that in cases of corruption it is necessary to impose a sentence of imprisonment as a sentence of fine has no deterrent effect ... the offender should be imprisoned and such a sentence would be consistent with the enormity of the offence committed by him ...

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which cited the case of *Rex v. Teo Cheng Lian And Rex v. Leck Kwee Ser* [1949] 1 LNS 81; [1949] MLJ 170 in which Gordon Smith J had stated:

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Bribery and corruption of officialdom is like a cancer which may grow and destroy the whole body ... I do not think that the mere imposition of a fine is likely to act as a deterrent in this class of offence.

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- A [42] This is echoed by Alauddin Mohd Sheriff FCJ in *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421; in p. 434 who expounded:

The offence of corruption, if unabated or undeterred, is more far reaching in its consequences than the crime of robbery, criminal breach of trust or rape. Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.

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- C [43] In respect of offences committed by public officers, Abdul Hamid Omar J on appeal at first instance in *PP v. Francis Philip Nunis* [1982] CLJ 254; [1982] CLJ (Rep) 648 had this to say at p. 654:

It must however be observed that the respondent has committed a very serious offence. Perhaps it would also be appropriate to say that if there is hope for the country to have a clean and efficient administration it is essential that members of the administration should not be corrupt. Offences for corrupt practice committed by a public officer, Members of Parliament and Assemblymen must therefore be dealt with severely. Public interests demands it.

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- E which is added to in the case of *PP v. Ismail Mohd Azmi & Anor* [2009] 1 LNS 918 by Yeoh Wee Siam JC:

The Accused and Black should not be strutting around like little Napoleons, and demanding corruption money from their victims in the name of enforcement. Corruption is a most heinous crime which ought to be wiped out so that business and trade in this country can flourish, and society can carry on its undertakings without being raided by police officers such as the Accused. It would certainly improve Malaysian's ranking on the global corruption index if crimes of this nature can be totally eradicated.

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- H [44] Based on the above principles in the above cited cases, the Court is of the view that the learned Sessions Court Judge (at pp. 319 to 320 ROA) had not in the sentencing of the appellants failed to take into consideration irrelevant matters or omitted to take into consideration relevant mitigation factors which appears to have been correctly overridden by the paramount consideration for public policy. There is no manifest error in law in the sentence the learned Sessions Court Judge had handed down for this court to interfere. The appellants appeal against sentence fails.

I

Conclusion

[45] The appellants rightly found guilty and convicted on the seventh amended charge preferred against them. The court finds that the sentence imposed upon the appellants is in accordance with law and also just and fair under the circumstances of the case. The court will dismiss the appellants appeal against conviction and sentence under the seventh amended charge.

A**B****C****D****E****F****G****H****I**